

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Comcast of Dallas, L.P.)	CSR 6445-E
)	
Petition for Determination of Effective)	
Competition in Dallas, Texas)	

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 2005

Released: November 14, 2005

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Comcast of Dallas, L.P. ("Comcast") has filed with the Commission a petition pursuant to Sections 76.7 and 76.905(b)(1) & (2) and 76.907 of the Commission's rules seeking a finding of effective competition in Dallas, Texas (the "Community").¹ Comcast alleges that its cable system serving the Community is subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act")² and therefore exempt from cable rate regulation because of competing service provided by two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and EchoStar Communications Corporation ("EchoStar")³. The City of Dallas ("Dallas" or the "City") filed an opposition, to which Comcast replied.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the record in this proceeding, Comcast has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the

¹See 47 C.F.R. §§ 76.7(a)(1) and 76.905(b)(1) & (2).

²See 47 U.S.C. § 543(a)(1).

³EchoStar is marketed as the DISH Network.

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

⁶See 47 C.F.R. §§ 76.906 & 907.

households in the franchise area.⁷ Turning to the first prong of the competing provider test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is available.⁸ Comcast has provided evidence of the advertising of DBS service in the news media serving the Community.⁹ The two DBS providers' subscriber growth reached approximately 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar the fourth largest, MVPD provider.¹⁰ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the Community listed on Attachment A are DBS subscribers, we conclude that the population of the community at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer at least 12 channels of video programming, including at least one non-broadcast channel.¹¹ We find that Comcast has demonstrated that the Community is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the Community. Comcast also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Community, that there exists no regulatory, technical, or other impediments to households within the Community taking the services of the DBS providers, and that potential subscribers in the Community have been made reasonably aware of the MVPD services of DirecTV and EchoStar. Accordingly, we find that the first prong of the competing provider test is satisfied.

4. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Comcast asserts that it is the largest MVPD in the Community.

5. Comcast derived the DBS subscribership based on an allocation methodology previously approved by the Commission.¹² To determine the zip codes that covered the Community in whole or in part, Comcast contacted Media Business Corp ("MBC," previously known as SkyTrends), which uses a

⁷47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹*See* Comcast Petition at 3-4 and Exhibit 1. The City objects to the advertising material submitted by Comcast for the following reasons: 1) they are inadmissible hearsay news reports or opinion pieces from newspapers; 2) they are irrelevant because the DISH lineup is undated and does not specify availability in Dallas; and 3) the DirecTV lineup dated July 20, 2004 is too remote in time to support the Petition and contains no reference to availability in the Dallas area. Opposition at 3. We reject these arguments because the advertising materials submitted by Comcast are consistent with information that the Commission has historically accepted for the purpose of establishing that potential subscribers are reasonably aware of the availability of DBS service. *See, e.g., In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

¹⁰ *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, 20 FCC Rcd 2755, 2792 at ¶¶ 54-55 (rel. Feb. 4, 2005).

¹¹*See* 47 C.F.R. § 76.905(g); *see also* Comcast Petition at 4-5 and Exhibits 2 and 3.

¹²*Id.* at 5-6 and Exhibit 5; *see, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo City, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002); *In the Matter of CSC Holdings, Inc.*, 19 FCC Rcd 6891 (2004).

process known as “geocoding” to identify the relevant zip codes within the franchise area.¹³ MBC then compares the block group households located within the franchise area with the total number of block group households included in the zip code area as a whole to derive an allocation factor, which reflects the portion of a five digit postal zip code that lies within the boundaries of the City.¹⁴ Comcast then sought to determine the competing provider penetration of its franchise area by purchasing a report from the Satellite Broadcasting Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Community on a five-digit zip code basis.¹⁵ To obtain the proper allocation figure to apply to the DBS subscriber numbers provided by SBCA, Comcast applies the MBC allocation factor to the zip code based SBCA subscriber figures. The resulting number represents the DBS subscribership within the City. Comcast then compared the DBS subscribership to the 2000 U.S. Census household figures for the Community.

6. In opposition, Dallas raises several preliminary, procedural objections. Dallas argues that the declaration supporting the Petition violates Commission rule Section 1.16 because the declarant does not have personal knowledge and the Exhibits following the declaration are not authenticated and are inadmissible hearsay because the declarant lacks actual knowledge of the contents thereof.¹⁶ The City also requests that the Commission sanction Comcast by dismissing the Petition -- for failing to adhere to a prior warning by the Bureau in an unrelated matter¹⁷-- because the footnote font is smaller than 12-point and the spacing between footnote lines may be smaller than the minimum allowed by Commission rule Section 1.49(a).¹⁸ In reply, Comcast argues that the City’s preliminary objections are misguided and provide no basis for dismissal.¹⁹ Comcast asserts that the declaration supporting the Petition is consistent with Section 1.16 of the Commission’s rules because it was signed by the local Comcast official under the penalty of perjury that the information was true and accurate.²⁰ Finally, Comcast argues that the inadvertent error with the footnote font does not justify a sanction such as the dismissal of the Petition since it occurred as a result of a Microsoft Word program default and was not made to evade the Commission’s filing requirements.²¹

7. We reject the City’s preliminary objections. The declaration submitted in support of the Petition is consistent with Section 1.16 of our rules.²² In addition, the certification requirement under Section 76.6(a)(4) of our rules requires that the signatory certify that the Petition is warranted by existing law or a good faith extension.²³ In this instance, there is both a declaration from the local Comcast official and a certification by the law firm representing Comcast. We deem this sufficient. We also reject the City’s argument that the DBS penetration numbers submitted by Comcast are inadmissible hearsay. The Commission has repeatedly accepted SBCA’s subscriber reports on behalf of the DBS providers in

¹³ Comcast Petition at 6-7. Comcast alleges that geocoding is more accurate because it allows a comparison to be made between block group households located within the franchise area to the total number of block group households included in the zip code area as a whole.

¹⁴ *Id.*

¹⁵ *Id.* at 5-8 and Exhibits 4, 5, and 6.

¹⁶ Opposition at 1-3; 47 C.F.R. § 1.16.

¹⁷ *Id.* at 5-6, citing *Comcast Cable of Dallas, Inc.*, 19 FCC Rcd 17421, 17421-22, n. 5 (MB 2004).

¹⁸ *Id.*; 47 C.F.R. § 1.49(a).

¹⁹ Reply at 4.

²⁰ *Id.* at 5.

²¹ *Id.* at 5-6.

²² 47 C.F.R. § 1.16.

²³ 47 C.F.R. § 76.6(a)(4).

satisfaction of Section 76.907(c) of the Commission's rules.²⁴ Pursuant to this provision, cable operators may request subscriber information from competitors for effective competition purposes, however, this information may be limited to numerical totals.²⁵ Section 76.907(c) clearly contemplates that cable operators may rely on such information in petitioning the Commission for a determination of effective competition. We accept the SBCA Report submitted by Comcast as reliable evidence relating to the DBS penetration rate in the Dallas franchise area.²⁶ We also reject the City's request to dismiss the Petition because the footnote font and spacing deviates slightly from Commission requirements. Although we expect filings to the Commission to be consistent with all of our rules, we believe dismissal in this instance would be extreme. Moreover, dismissal of Comcast's Petition for technical footnote spacing and font size errors would be needlessly burdensome to all parties involved in that it would merely necessitate the refile of a substantively-identical, technically-compliant petition by Comcast and a repetition of the pleading cycle that has already taken place in this proceeding.

8. Finally, the City makes numerous arguments regarding the calculation of the DBS subscribership penetration. Initially, the City argues that Comcast relies on outdated census information.²⁷ The City also contends that the penetration methodology relies on unsupported assumptions concerning the same residential/commercial/industrial mix in each zip code and the exclusion of commercial, free, and discontinued satellite accounts.²⁸ Furthermore, the City claims that the SBCA Report fails to deduct or explain why no deduction is needed for potential customers in multi-unit buildings lacking exterior windows that face directions suitable for satellite signal reception, customers receiving both Comcast BST service and satellite service, customers billed within Dallas that receive service outside the city, and multiple satellite accounts at the same household. In reply, Comcast argues that the City has failed to rebut the prima facie showing of effective competition. Comcast asserts that the Petition is consistent with effective competition petitions already reviewed and granted by the Commission, which has frequently accepted data far older than the 2000 data at issue here.²⁹ Comcast also rejects the City's arguments regarding the "unsupported assumptions" used in Comcast's DBS penetration analysis noting that the methodology closely tracks the approach already accepted by the Commission in numerous rulings.³⁰ Comcast argues that the City's substantive challenge is really nothing more than a critique of the methodology explanation that SBCA provides with the Report. According to Comcast, the SBCA Report explains that commercial and discontinued accounts, as well as customers who receive service outside the City that are billed within the City, are excluded from the DBS total to prevent artificially increasing the DBS penetration in a manner inconsistent with the Commission's rules. Comcast also disagrees with the City's argument for excluding customer premises that are not suitable for satellite signal reception since the SBCA Report counts only DBS subscribers, which are axiomatically limited to households capable of receiving satellite service.

²⁴ See, e.g., *In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005); *In the Matter of CSC Holdings, Inc.*, 19 FCC Rcd 6891, 6892 (2004). Although SBCA has succeeded SkyTrends in providing the DBS penetration figures, the Reports are substantially the same and continue to provide accurate data for determining effective competition.

²⁵ 47 C.F.R. § 907(c).

²⁶ We note that both of the DBS providers that provide the subscribership information used to generate the SBCA Reports are Commission licensees. As such, the Commission has the ability to sanction these providers should the information they provide to the cable operators pursuant to Section 76.907(c) prove to be misleading or inaccurate. 47 C.F.R. § 76.907(c).

²⁷ Opposition at 7-8.

²⁸ *Id.*

²⁹ Reply at 2.

³⁰ *Id.*

9. We find that the City's arguments lack merit. We reject the City's argument that the 2000 Census data is outdated since we have consistently held that 2000 Census data is sufficiently reliable for effective competition determinations.³¹ Nevertheless, the Commission has indicated that it "will accept more recent household data that is demonstrated to be reliable."³² The City has not offered more-recent, equally-reliable data regarding the number of households in the Dallas franchise area. We will therefore use the Census 2000 data submitted by Comcast. With regard to the DBS subscribership data, Comcast provided the City with a copy of the SBCA Report identifying the total number of DBS subscribers located within the franchise area, as well as a copy of the methodology detailing how SBCA reached this result.³³ If the City believed that other data would provide more accurate DBS subscriber counts, the burden to present such evidence for the record was the City's. The City's argument that the SCBA Report should have somehow discounted the number of DBS subscribers to reflect multi-unit buildings lacking exterior windows that face directions suitable for satellite signal reception misapprehends the second prong of the competing provider test. The second prong of the competing provider test for effective competition directs the Commission to determine whether MVPD(s), other than the largest MVPD, actually provide service to 15 percent or more of the total number of households in the franchise area.³⁴ Thus, the City's suggestion that we use a figure that contains an unspecified discount to reflect multi-unit buildings with signal reception problems is inconsistent with Section 623(l)(1)(B)(ii).³⁵ The SBCA Report specifies the methodology used in compiling the DBS subscribership and addresses many of the City's other alleged "unsupported assumptions" regarding the type of subscribers that are included and excluded to avoid duplication and accurately reflect the individuals subscribing to DBS service within the franchise area for purposes of determining effective competition.³⁶ Accordingly, we will accept the number of Dallas DBS subscribers indicated in Comcast's petition.

10. Based upon the aggregate DBS subscriber penetration levels, as reflected in Attachment A, calculated using Census 2000 household data,³⁷ we find that Comcast has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Community. Therefore, the second prong of the competing provider test is satisfied as to the Community. Based on the foregoing, we conclude that Comcast has submitted sufficient evidence demonstrating that its cable system serving the Community is subject to effective competition.

³¹ See, e.g., *In the Matter of Cablevision of Raritan Valley, Inc. et al.*, 19 FCC Rcd 6966, 6968 (2004); *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³² *In the Matter of Adelphia Cable Communications*, 20 FCC Rcd 4979, 4982 (2005); *In the Matter of MCC Iowa LLC*, 2005 WL 2513517 (2005).

³³ Petition Exhibits 4 and 5.

³⁴ 47 U.S.C. § 543(l)(1)(B)(ii).

³⁵ *Id.*

³⁶ *Id.*, Exhibit 5.

³⁷ *Id.* at 5-8 and Exhibits 4, 5, and 6.

III. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Comcast of Dallas, L.P. **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification of the City of Dallas, Texas to regulate basic cable service rates **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

³⁸47 C.F.R. § 0.283.

CSR-6445-E

COMMUNITY SERVED BY COMCAST OF DALLAS, L.P.

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS Subscribers⁺
Dallas	TX0762	17.61%	451833	79581

*CPR = Percent of competitive DBS penetration rate.

⁺See Comcast Petition at 8 and Exhibits 5 and 6.